

Southern New York Area Local, American Postal Workers Union, AFL-CIO (United States Postal Service) and Steven Rasnick. Case 3-CB-3913(P)

March 4, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
JENKINS AND HUNTER

On September 30, 1982, Administrative Law Judge Martin J. Linsky issued the attached Decision in this proceeding. Thereafter, the General Counsel filed limited exceptions.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Southern New York Area Local, American Postal Workers Union, AFL-CIO, Yonkers, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

¹ The General Counsel has excepted to the Administrative Law Judge's inadvertent failure to include a reference in the notice to employees and members to Sec. 2(b) of the recommended Order, which requires that Respondent make Rasnick whole for any loss of earnings. We therefore shall modify the recommended Order and substitute a new notice for that of the Administrative Law Judge to correct this error. We also shall modify Sec. 1(b) of the recommended Order by substituting the "restraining or coercing" language for the "interfering with, restraining or coercing" language used by the Administrative Law Judge as is appropriate in cases where unions are found to have violated the rights of employees.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail or refuse to fairly represent any employee we represent in the processing and filing of grievances.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in the National Labor Relations Act.

WE WILL pursue in good faith and with all due diligence, the grievance of Steven Rasnick.

WE WILL make Steven Rasnick whole for any of loss of earnings he may have suffered as a result of our unlawful conduct, with interest.

SOUTHERN NEW YORK AREA LOCAL,
AMERICAN POSTAL WORKERS UNION,
AFL-CIO

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge: This case was heard before me in Monticello, New York, on June 9, 1982. The complaint in this matter was issued by the Regional Director for Region 3 on October 8, 1981, based on a charge filed by Steven Rasnick on September 4, 1981. The complaint alleges that the Southern New York Area Local, American Postal Workers Union, AFL-CIO (herein Respondent), violated Section 8(b)(1)(A) of the National Labor Relations Act (herein the Act), by refusing to process a grievance filed by Steven Rasnick arbitrarily and/or because Rasnick was not a member of Respondent.

Respondent filed an answer in which it claimed that since Steven Rasnick was not an employee in the bargaining unit represented by Respondent that Respondent was prohibited from processing his grievance. At the opening of the hearing Respondent amended its answer. It admitted that Steven Rasnick was in the bargaining unit represented by Respondent, that Respondent had a duty to represent him, but persisted in its denial that it committed an unfair labor practice by the manner in which Steven Rasnick's grievance was handled.

Upon consideration of the entire record, including post-hearing briefs filed by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

United States Postal Service, herein the employer, is an independent establishment of the Government of the United States, which provides postal service throughout the United States. The National Labor Relations Board derives its jurisdiction over the employer and this matter from Section 1209 of the Postal Reorganization Act. Respondent admits, and I find, that it and the American Postal Workers Union, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

It is the contention of the General Counsel that Respondent violated its duty to represent Steven Rasnick fairly by arbitrarily refusing to process his grievance because of Rasnick's nonmembership in Respondent Local. Respondent contended at the hearing that it handled Rasnick's grievance in an appropriate fashion, i.e., having determined his grievance was totally lacking in merit Respondent was well within its rights in failing to process the grievance.

The facts developed at the hearing disclose that Steven Rasnick began his employment with the U.S. Postal Service in January 1979. Initially assigned to the post office at Wappingers Falls, New York, Rasnick promptly joined the Mid-Hudson Area Local of the American Postal Workers Union, AFL-CIO. The Mid-Hudson Area Local is a sister local to Southern New York Area Local, which had Monticello in its jurisdiction. Between January 1979 and July 1981, Rasnick worked at three different postal facilities in New York; i.e., the facilities at Wappingers Falls, Lew Beach, and Monticello. In July 1981, Rasnick approached Wayne Rutledge, the postmaster at Monticello, and explained to Rutledge that he (Rasnick) lived in Monticello and wanted to get some hours in at the Monticello postal facility if he could. Rutledge hired Rasnick and, beginning in July 1981, Rasnick split his hours between Lew Beach, New York, a small one-person post office where Rasnick would replace the postmaster, and Monticello, a considerably larger facility. For approximately 1 month everything appears to have gone okay with Rasnick. On August 7, 1980, Rasnick was asked by Supervisor Mary Rupp to work 8 hours at the Monticello facility that day rather than his scheduled 4 hours. He said he would. Rasnick reported for work and took his luncheon meal after about 2-1/2 hours. He was at home on lunch break when the postmaster from Lew Beach (Leona Kuttner) called him to discuss a change in the way in which his timecard was filled out. When Rasnick returned from lunch his timecard at the Monticello facility was missing. He sought out the supervisor then on duty (Jerry Shortall) to find out what was going on and Shortall advised him that he would not be working any more that day. He asked Shortall why and Shortall suggested he talk with the Lew Beach postmaster. Rasnick called Ms. Kuttner who told Rasnick to let her speak with Shortall. Shortall and Kuttner spoke for a few minutes and Shortall then hung up the phone and told Rasnick that post-

masters were important to the careers of personnel like Rasnick and that Rasnick would not be working any more that day but could come back the next day. Rasnick complained that "casuals" were working and for him a part-time career employee to be sent home when "casuals" were working was in violation of the national agreement. Shortall apparently did not agree and sent Rasnick home. Rasnick testified credibly at the hearing that two or three casuals were working when he was sent home. He further testified that he felt that sending him home while casuals were working violated article 7 of the national agreement between the U.S. Postal Service and the American Postal Workers Union and National Association of Letter Carriers, which provides in part that the U.S. Postal Service "will make every effort to [e]nsure that qualified and available part-time flexible employees are utilized at the straight time rate prior to assigning such work to casuals." Rasnick is a part-time flexible employee.

The next day, August 8, 1981, Rasnick worked his normal day, which was 4 hours in the morning at Lew Beach and 4 hours in the afternoon at Monticello, and on August 9, 1981, he worked a full 8 hours at Monticello. On Monday, August 10, 1981, although not scheduled to work, Rasnick called Monticello in any event to see if they could use him. The supervisor on duty said that Mr. Shortall had said that Rasnick was unreliable and they could not use him that day. For the next several days Rasnick called seeking work at Monticello and was always told that because Shortall viewed him as unreliable, i.e., he supposedly only worked the hours he wanted, that they could not use him.

On August 10, 1981, Rasnick called Irene Savage, the union shop steward, and told her he wanted to file a grievance because he felt his rights under the national agreement were being violated. Savage said that if management did not want to utilize him they were within their rights. Rasnick told her he disagreed. She also told Rasnick that it was the Union's policy not to represent associate office flexibles. Savage told Rasnick she would look into the matter and get back to him. Two days later, on August 12, Rasnick called Savage again (she had not gotten back to him). Savage told Rasnick that management considered him unreliable in the sense that they thought he worked only when he wanted to and they were within their rights in refusing to give him hours. Rasnick said he wanted to pursue a grievance and Savage said she was without authority to do so and suggested he call the president of Respondent, Richard Giancola. Rasnick called Giancola several times without getting through to him. On August 19, Giancola called Rasnick's home and left a message with Rasnick's wife. When Rasnick returned home he called Giancola back and was told by Giancola that management was within its rights in refusing to employ him, and, with regard to pursuing a grievance that he could not represent Rasnick because of Rasnick's status as an associate office flexible and that Rasnick should go to his own local; i.e., the Mid-Hudson Area Local. He also told Rasnick to go to the national if he wanted representation. Rasnick told Giancola that his interpretation of the national agreement

"wasn't worth a shit." Several days prior to his conversation with Giancola, Rasnick had spoken with Pat Calahan, the president of the Mid-Hudson Area Local, and Calahan had told him that jurisdiction for pursuing the grievance rested with Respondent because they covered the area in which the Monticello postal facility was located.

With the exception of one tour of duty on one day at Monticello, Rasnick has worked only at Lew Beach and Wappingers Falls (which is some 65 miles from his home in Monticello), since the time Respondent refused to process his grievance. Rasnick filed a charge with the Board on September 4, 1981.

In January 1982, Rasnick was called by Mr. Podmore, replacement postmaster at Monticello.¹ Podmore told Rasnick that he would be offered some hours at Monticello but if he turned them down he would never be offered hours again. Rasnick worked one 4-hour tour from 2 a.m. to 6 a.m. and was then told that his hours would be 2-hours a day, from 4 a.m. to 6 a.m. Rasnick, who was averaging 36 hours a week between Wappingers Falls and Lew Beach and who also has a wife and two children to support, turned down the offer as providing insufficient income for his needs.

I credit Rasnick's testimony in its entirety.² President Giancola testified. He was evasive and gave several varied versions of his conversation with Rasnick. Insofar as there is conflict between the testimony of Rasnick and Giancola, I credit Rasnick and not Giancola. Bolstering the testimony of Rasnick is the answer filed by Respondent to the complaint wherein Respondent denies that it had any duty to represent Rasnick in pursuing his grievance because of Rasnick's nonmembership in Respondent. In addition, the General Counsel introduced into evidence a position letter from Respondent's original attorney³ (G.C. Exh. 3), dated September 29, 1981, which stated in pertinent part that "Southern Area Local President Richard A. Giancola refused to file a grievance. He explained to Rasnick that article XVII of the collective-bargaining agreement precluded any local other than Mid-Hudson from representing him throughout the grievance procedure because of his status as a regular employee at Lews Beach." As noted earlier, Respondent, through its new counsel, conceded at the hearing that Respondent had a duty to represent Rasnick in his grievance.⁴

¹ This call was evidently prompted by a meeting between Mr. Podmore and Donald Silvestri, business agent for Respondent. At some time subsequent to the filing of the charge with the Board, but unclear from the record exactly when, Silvestri visited Podmore in Monticello and asked Podmore to give some hours at Monticello to Rasnick. It is clear from Silvestri's testimony that this personal appeal by him to Podmore was not in any sense a processing of Rasnick's grievance but simply a personal appeal to help out Rasnick. Rasnick was never informed by Respondent that this was done on his behalf.

² Shop Steward Irene Savage was not called as a witness.

³ Respondent was represented by two different lawyers. In the investigatory stage they were presented by Thomas J. Bianco of O'Donnell and Schwartz, who signed the position letter (G.C. Exh. 3) and who filed the original answer. At the hearing and thereafter Respondent has been represented by Arthur Luby of the same firm. Mr. Bianco is no longer with the firm. Bianco was not called as a witness.

⁴ The position letter was admitted over objection by Respondent. I admitted it into evidence as an admission against interest. *Florida Steel Corporation*, 235 NLRB 1010, 1012 (1978).

The duty to represent Rasnick, however, does not mean that Respondent must pursue the grievance even if it is totally lacking in merit. President Giancola claimed in his testimony that he told Rasnick that he should go to Mid-Hudson Area Local with his grievance in the first instance and if he did not receive satisfaction to return to Respondent and they would look into the grievance. I do not credit this testimony because I conclude that if Giancola had said this Rasnick would have gotten back to him or informed him that Mid-Hudson was not handling the matter, and, further, Respondent's first attorney would not have filed the answer he filed nor prepared the position letter referred to above. Giancola also testified that relying on a prior arbitration decision and two columns that had appeared on different dates in the American Postal Workers Union magazine that Rasnick's grievance was totally lacking in merit. Copies of the arbitrator's decision and the magazine columns are a part of this record and do not, in my opinion, form a basis for someone reasonably concluding that Rasnick's grievance was lacking in merit. Accordingly, Respondent has failed to prove that it would have lost the grievance if it had been pursued.

The record as a whole supports only one conclusion and that is that Respondent, through its agents Shop Steward Irene Savage and President Richard A. Giancola, arbitrarily refused to process Steven Rasnick's grievance because of his nonmembership in Respondent. President Giancola conceded that if a member of Respondent had filed a grievance complaining about casuals working ahead of part-time career employees (such as Rasnick) he would have pursued the grievance. At the hearing Giancola tried to explain that as a "loanee" Rasnick is in a separate category from other part-time career employees, however, there is nothing in the national agreement, the arbitrator's decision, or the magazine columns to support this position.

It is a violation of Section 8(b)(1)(A) for a union to refuse to process a grievance filed by an employee merely because the employee is not a member of that union or local. *United Electrical, Radio and Machine Workers of America and Local 1105, United Electrical, Radio and Machine Workers of America (Westinghouse Electric Corporation)*, 254 NLRB 1186 (1981); *Teamsters Local 559*, 243 NLRB 848 (1979); *International Association of Machinists and Aerospace Workers, Local Union No. 697 (The H.O. Canfield Rubber Company of Virginia, Inc.)*, 223 NLRB 832, 834 (1976); *UAW, Local 1303 (Jervis Corp., Bolivar Division)*, 192 NLRB 966 (1971). However, a union need not expend time and resources pursuing a clearly frivolous grievance. *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

It is my conclusion that Respondent refused to process and pursue Rasnick's grievance because of his nonmembership in Respondent. Further, Respondent has not shown that the grievance was clearly frivolous nor shown that Rasnick would have lost the grievance if it had been pursued. Accordingly, Respondent has violated Section 8(b)(1)(A) of the Act.

REMEDY

The remedy for a union's violation of its duty to represent an employee fairly in the processing and filing of a grievance is that the union should be ordered to cease and desist from that practice, post an appropriate notice, and take affirmative action to redress the wrongdoing. The affirmative action should include an order requiring Respondent to pursue Steven Rasnick's grievance in good faith with due diligence and to make Rasnick whole for any loss of earnings he may have suffered as a result of Respondent's unlawful conduct. Any uncertainty as to whether Rasnick's grievance would have been found meritorious is a direct product of Respondent's unlawful action. *Henry J. Kaiser Company*, 259 NLRB 1 (1981), *Laborers International Union of North America, Local 324, AFL-CIO (Center Homes of California, Incorporated)*, 234 NLRB 367 (1981).

CONCLUSIONS OF LAW

1. Southern New York Area Local, American Postal Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. In failing and refusing to represent Steven Rasnick fairly in the filing and processing of his grievance because of his nonmembership in Respondent, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(1)(A) Section 2(6) and 2(7) of the Act.

3. Respondent has not otherwise violated the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein and pursuant to Section 10(c) of the Act, I hereby recommend the issuance by the following:

ORDER⁵

The Respondent, Southern New York Area Local, American Postal Workers Union, AFL-CIO, Monticello, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to fairly represent any employee it represents in the processing and filing of grievances.

⁵ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Pursue in good faith and with due diligence the grievance of Steven Rasnick.

(b) Make Steven Rasnick whole for any loss of pay he may have suffered by reason of Respondent's failure to pursue his grievance by payment to him of a sum of money equal to that which that employee normally would have earned if his grievance had been successfully pursued until such time as he obtains the relief requested in his grievance or Respondent secures consideration of his grievance by U.S. Postal Service and thereafter pursues it with all due diligence, whichever is sooner, with backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)).

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices from the Union to members and employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."